

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC.

vs.

LAWSON SOFTWARE, INC.

:
: Civil Action No.
: 3:09CV620
:
:
: January 27, 2011
:

COMPLETE TRANSCRIPT OF THE JURY TRIAL

BEFORE THE HONORABLE ROBERT E. PAYNE

UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

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P R O C E E D I N G S

THE CLERK: Civil action number 3:09CV00620, ePlus Incorporated versus Lawson Software Incorporated. Mr. Scott L. Robertson, Mr. Craig T. Merritt, Mr. Michael G. Strapp represent the plaintiff. Mr. Dabney J. Carr, IV, represents the defendant. Are counsel ready to proceed?

MR. ROBERTSON: Yes, Your Honor.

MR. CARR: Yes, Your Honor.

THE COURT: All right, ladies and gentlemen, the record will reflect that the jury is here assembled, and I don't remember who it was that spent the night last night. I hope your accommodations were all right.

JUROR: They were good.

THE COURT: And you got everything taken care of with the financial part of it because you shouldn't -- one time we had a juror, and you watch out, because sometimes -- the juror got a bill about six months later. So you keep your eyes open, and we'll take care of it.

All right, you may resume your deliberations. Let us know what your plans are, and we'll be here the whole time. We're planning -- if you need to stay late, we're planning to be late. There's a limit to how late I can stay. All right, thank you. I don't know. We'll face that if and when it happens.

1 (Jury out.)

2

3 THE COURT: The latest I've ever stayed was --

4 THE CLERK: I was going to say, that would be a
5 first.

6 THE COURT: Was 11:30 or something like that.

7

8 (Discussion off the record.)

9

10 THE COURT: We will be in recess.

11

12 (Court recessed while jury deliberates.)

13 (Jury in.)

14

15 THE CLERK: Madam Foreperson, has the jury reached a
16 unanimous verdict in this case?

17 JURY FOREPERSON: We have.

18 THE COURT: All right. Publish the verdict, please.

19 THE CLERK: This is in civil action number
20 3:09CV00620, ePlus Incorporated versus Lawson Software,
21 Incorporated. We, the jury, find as follows, number one, on
22 infringement.

23 Do you find that ePlus has proven that it is more
24 likely than not that the following accused configurations of
25 the Lawson S3 procurement system have infringed the listed

1 claims of the ePlus patents either directly or indirectly? As
2 to each claim, a yes answer is a finding for ePlus, a no answer
3 is a finding for Lawson.

4 Configuration number one, core S3 procurement system
5 (Lawson System Foundation, LSF/process flow, in combination
6 with inventory control, requisition, and purchase order
7 modules: 516 patent, claim one, answer, no.

8 '516 patent, claim six, answer, no.

9 Configuration number two, core S3 procurement system,
10 Lawson system foundation, LSF/process flow in combination with
11 inventory control, requisition, and purchase order modules, and
12 requisition self-service or, in quotation, RSS: '683 patent,
13 claim three, answer no.

14 '683 patent, claim 28, answer, no.

15 '516 patent, claim one, answer, no.

16 '516 patent, claim six, answer, no.

17 '516 patent, claim nine, answer, no.

18 '516 patent, claim 21, answer, no.

19 '516 patent, claim 22, answer, no.

20 '516 patent, claim 29, answer, no.

21 '172 patent, claim one, answer, yes.

22 Configuration number three, core S3 procurement
23 system, Lawson system foundation, LSF/process flow, in
24 combination with inventory control, requisition, and purchase
25 order, modules, requisition self-service, or RSS, and punchout:

1 683 patent, claim three, answer, yes.

2 '683 patent, claim 26, answer, yes.

3 '683 patent, claim 28, answer, yes.

4 '683 patent, claim 29, answer, yes.

5 '516 patent, claim one, answer, no.

6 '516 patent, claim two, answer, no.

7 '516 patent, claim six, answer, no.

8 '516 patent, claim nine, answer, no.

9 '516 patent, claim 21, answer, no.

10 '516 patent, claim 22, answer, no.

11 '517 patent, claim 29, answer, no.

12 '172 patent, claim one, answer, yes.

13 Configuration number four, core S3 procurement
14 system, Lawson system foundation, LSF/process flow, in
15 combination with inventory control, requisition, and purchase
16 order modules and electronic data interchange, or EDI:

17 '683 patent, claim 26, answer, no.

18 '516 patent, claim one, answer, no.

19 '516 patent, claim six, answer, no.

20 Configuration number five, core S3 procurement
21 system, Lawson System Foundation, LSF/process flow, in
22 combination with inventory control, requisition, and purchase
23 order modules, requisition self-service or RSS, punchout, and
24 electronic data interchange or EDI:

25 '683 patent, claim three, answer, yes.

1 '683 patent, claim 26, answer, yes.

2 '683 patent, claim 28, answer, yes.

3 '683 patent, claim 29, answer, yes.

4 '516 patent, claim one, answer, no.

5 '516 patent, claim two, answer, no.

6 '516 patent, claim six, answer, no.

7 '516 patent, claim nine, answer, no.

8 '516 patent, claim 21, answer, no.

9 '516 patent, claim 22, answer, no.

10 '516 patent, claim 29, answer, no.

11 '172 patent, claim one, answer, yes.

12 Two, validity, as to each claim, a yes answer is a
13 finding for Lawson. A no answer is a finding for ePlus. Do
14 you find that Lawson has proven by clear and convincing
15 evidence that any of the following claims are anticipated by
16 the Fisher RIMS system:

17 '683 patent, claim three, answer, no.

18 '683 patent, claim 26, answer, no.

19 '683 patent, claim 28, answer, no.

20 '683 patent, claim 29, answer, no.

21 '516 patent, claim one, answer, no.

22 '516 patent, claim two, answer, no.

23 '516 patent, claim six, answer, no.

24 '516 patent, claim nine, answer, no.

25 '516 patent, claim 21, answer, no.

1 '516 patent, claim 22, answer, no.

2 '516 patent, claim 29, answer, no.

3 '172 patent, claim one, answer, no.

4 B, do you find that Lawson has proven by clear and
5 convincing evidence that any of the following claims are
6 anticipated by U.S. patent number 5,712,989:

7 '683 patent, claim three, answer, no.

8 '683 patent, claim 26, answer, no.

9 '683 patent, claim 28, answer, no.

10 '683 patent, claim 29, answer, no.

11 '516 patent, claim one, answer, no.

12 '516 patent, claim two, answer, no.

13 '516 patent, claim six, answer, no.

14 '516 patent, claim nine, answer, no.

15 '516 patent, claim 21, answer, no.

16 '516 patent, claim 22, answer, no.

17 '516 patent, claim 29, answer, no.

18 '172 patent, claim one, answer, no.

19 C, do you find that Lawson has proven by clear and
20 convincing evidence that any of the following claims are
21 obvious in light of the combination of, one, either the RIMS
22 system, the RIMS brochure, and/or U.S. patent number 5,712,989,
23 and, two, either the TV/2 system, the TV/2 brochure, and/or the
24 TV/2 general information manual:

25 One, '683 patent, claim three, answer, no.

1 Two, '683 patent, claim 26, no.

2 Three, '683 patent, claim 28, answer, no.

3 Four, '683 patent, claim 29, answer, no.

4 Five, '516 patent, claim one, answer, no.

5 Six, '516 patent, claim two, answer, no.

6 Seven, '516 patent, claim six, answer, no.

7 Eight, '516 patent, claim nine, answer, no.

8 Nine, '516 patent, claim 21, answer, no.

9 Ten, '516 patent, claim 22, answer, no.

10 11, '516 patent, claim 29, answer, no.

11 12, '172 patent, claim one, answer, no. It's dated

12 January 27th, 2011, and it's signed by all members of the jury

13 panel, Leanne W. Wight, Kristin M. Caufield, Betty Rose

14 Raymond, George Andrew Kiersarsky, Jason Lamont Chalmers,

15 Marchelle Lee Sossong, Richard Lee Compher, and Carrie Emerson.

16 Ladies and gentlemen of the jury, is this your unanimous

17 verdict in this case.

18 (Indicating affirmatively.)

19 THE CLERK: Thank you.

20 THE COURT: Is there any reason we can't discharge

21 the jury?

22 MR. CARR: Your Honor, I would like to request to

23 poll the jury.

24 THE COURT: Poll the jury, Mr. Clerk.

25 THE CLERK: Ladies and gentlemen, if indeed this was

1 your verdict in this case, please respond by stating yes.

2 Kristin Caufield.

3 JUROR: Yes.

4 THE CLERK: Leanne Wight.

5 JUROR: Yes.

6 THE CLERK: Betty Raymond.

7 JUROR: Yes.

8 THE CLERK: Gregory Kiersarsky.

9 JUROR: Yes.

10 THE CLERK: Jason Chalmers.

11 JUROR: Yes.

12 THE CLERK: Marchelle Sossong.

13 JUROR: Yes.

14 THE CLERK: Richard Compher.

15 JUROR: Yes.

16 THE CLERK: Carrie Emerson.

17 JUROR: Yes.

18 THE CLERK: Thank you.

19 THE COURT: Ladies and gentlemen, on behalf of the
20 counsel and the Court and the parties, I want to thank you for
21 the discharge of the civic duty that you have performed almost
22 for a month now. Your service has been exemplary, your
23 attention to detail has been exemplary, your persistence in the
24 face of difficulty, your paying attention, the care with which
25 you have discharged your duty has been a credit to the

1 citizenry in the discharge of this very difficult duty in any
2 case, but it is particularly difficult in patent cases that
3 deal with topics which with you are generally not familiar.

4 On behalf of everyone here, I'd like to express
5 appreciation to you, and all of us understand the imposition
6 that it has wrought upon you, your families, your employers,
7 your friends and we'd also note that no matter what the
8 situation, it is never easy to sit in judgment when the rights
9 of fellow citizens are involved. But it is essential that we
10 have people willing to do that and who did it as
11 conscientiously as you have in this case.

12 Have you reviewed the verdict form and you see no
13 need for any further discussion with the jury on any part of
14 it, counsel?

15 MR. ROBERTSON: Not for plaintiff, Your Honor.

16 MR. CARR: Not for defendant, Your Honor.

17 THE COURT: Thank you very much. Ladies and
18 gentlemen, you are excused with our gratitude. Thank you.
19 Drive carefully. Enjoy some free time.

20
21 (Jury out.)

22
23 THE COURT: We will need to have a hearing on an
24 injunction.

25 MR. ROBERTSON: Yes, sir.

1 THE COURT: And I need to know what the dimensions of
2 it are. I'd like for you all to confer and to talk with me in
3 a few minutes about how it will proceed, how long it will take,
4 when we will do it.

5 If you will talk for a few minutes and then get back
6 in touch with me, I'd appreciate it. We can do it in my
7 chambers, and we can plug in Mr. McDonald if you'd like to.

8 MR. CARR: I think that's probably a good idea. Your
9 Honor, have you thought -- have you considered whether you
10 would like briefing before the injunction hearing?

11 THE COURT: I think I want the evidence, and I want
12 all the evidence in and then I'll have post-trial briefing. Is
13 there any reason you all can't pull that together and talk with
14 me in, say, half an hour or so?

15 MR. CARR: No reason at all.

16 MR. ROBERTSON: That's fine, Your Honor.

17 THE COURT: All right. We'll be in --

18 THE CLERK: You have a supervised release right now.

19 THE COURT: They're going to have to wait for a few
20 minutes. I'll talk with you all in approximately half an hour.

21
22 (Recess.)

23 (In chambers with Mr. McDonald appearing
24 telephonically.)
25

1 THE COURT: Hello, Mr. McDonald. This is a
2 post-verdict conference being held in chambers in the ePlus v.
3 Lawson case. Mr. Robertson, Mr. Strapp are here, Mr. Carr, and
4 Mr. Merritt are in chambers, and Mr. McDonald is here. The
5 purpose is to discuss where do we go from here. You've been
6 read in on what the verdict was; is that right?

7 MR. McDONALD: I have, Your Honor. Thank you.

8 THE COURT: All right. So the relief available is an
9 injunction if an injunction is appropriate, there being no
10 damages.

11 MR. McDONALD: I'm sorry, Your Honor, I'm not hearing
12 you very well.

13 THE COURT: The relief available is an injunction if
14 an injunction is appropriate there being no damages in the
15 case. So what do you propose to do about that issue, Mr.
16 Robertson?

17 MR. ROBERTSON: Your Honor, I was talking to Mr. Carr
18 during the recess, and first, we have this issue of outstanding
19 JMOLs which we think, just as a matter of proper procedure,
20 should probably --

21 MR. McDONALD: Scott, could you speak up a little
22 bit.

23 MR. ROBERTSON: Yes, Mr. McDonald, I'll try. We have
24 this issue of some outstanding JMOLs. I think the Court has
25 denied Lawson's JMOLs. We still reserved on our JMOLs.

1 Obviously, we'd like to be heard on those just as a matter of
2 course to be able to make sure the record is consistent.

3 THE COURT: There's no need for them where a verdict
4 has been returned in your favor.

5 MR. ROBERTSON: Well --

6 THE COURT: You have to figure out which of the
7 verdicts, which of the verdicts I need to focus on.

8 MR. ROBERTSON: I think technically, Your Honor, we
9 could argue that notwithstanding that the jury found against us
10 on some of the infringement issues, we should be entitled to
11 judgment as a matter of law on infringement. I think the Court
12 can probably do that on the papers and we need not delay
13 ourselves. I think I understand what the Court is thinking is
14 coming from that, but --

15 THE COURT: It's not coming from anywhere except that
16 I don't believe that judgment as a matter of law is any longer
17 appropriate on a case where a verdict has been returned in
18 one's favor.

19 MR. ROBERTSON: Let us review that. If you want to
20 just focus on the remedy of the injunction --

21 THE COURT: I want to schedule whatever hearing has
22 to be had and get it on my book. I don't have a lot of time,
23 and I want to get you in and done while it's relatively fresh
24 in everybody's minds.

25 MR. ROBERTSON: My conversation with Mr. Carr during

1 the recess, and I understand he talked to Mr. McDonald, was we
2 don't think it would be necessary to have any witnesses appear
3 to testify. We think that the record is the record, and we can
4 rely on that. We think we could simply brief the issue and
5 argue it.

6 Obviously the Court knows that there are four factors
7 under *eBay v. MercExchange*. Obviously, I'm quite familiar with
8 that case since I was the plaintiff's counsel in that case that
9 went to the Supreme Court. We have irreparable injury and no
10 adequate remedy at law, we think that's where we are given the
11 Court's ruling on the damages issue.

12 Then there's the balancing of the hardships, and
13 there's the public interest, and we think we could put together
14 briefing with that, with respect to that, and that we think
15 that we would ask for an injunction hearing at the Court's
16 first possible opportunity but within the next three weeks. We
17 would anticipate that it would take a half day, Mr. Carr, to
18 present arguments?

19 MR. CARR: If we don't have any witnesses, a half day
20 for arguments I thought sounded acceptable. Mr. McDonald, do
21 you have any comment on that?

22 MR. McDONALD: On the witnesses issue, I would like
23 to have a chance to talk that over with the Lawson people. I
24 think on the issue of irreparable harm, now that we've got a
25 specific answer from the jury to talk about that situation,

1 which products would be subject to the injunction potentially
2 and which ones wouldn't and what is the impact on Lawson from
3 doing that, I think there is a possibility we'd want to bring
4 in a witness to talk about the harm to Lawson if an injunction
5 is granted.

6 We would like to present evidence on the public
7 interest issue as well, and in particular, regarding the
8 current status of the rejections of these patents on re-exam.
9 I don't know that we necessarily need a witness for that. We
10 could probably submit that on the papers. If the Court would
11 like the assistance of an expert to summarize what's going on
12 there and how that might relate to injunctive relief, we could
13 present an expert on that.

14 MR. ROBERTSON: Obviously, Your Honor, I think you
15 know our position with respect to the reexams.

16 MR. McDONALD: I cannot hear Mr. Robertson.

17 MR. ROBERTSON: I'm sorry, Mr. McDonald. Obviously,
18 Your Honor knows our position with respect reexams. They are
19 not before the Court, they are not in evidence, and they are
20 not relevant to these proceedings.

21 THE COURT: I'm sorry, I still can't --

22 MR. ROBERTSON: They are two separate proceedings,
23 Mr. McDonald, and we don't think they've been introduced in
24 evidence, we don't think they're appropriate at this time, but
25 I'm sure you will be briefing that, and I'll be responding to

1 that for the Court.

2 THE COURT: Well, he says that Lawson wants a witness
3 on the issue of injury; is that right?

4 MR. McDONALD: Yes, Your Honor. I'd at least like to
5 talk to them about that in view of the verdict and see if there
6 is evidence that would be of assistance to the Court on that
7 issue. I think it's a distinct possibility.

8 THE COURT: I'm having trouble to some extent because
9 I haven't thought through the results of this verdict form
10 findings, but you are much more familiar with all these
11 products and systems than I am, but what would you see as the
12 scope of the injunction here, Mr. Robertson, based on what you
13 know? Now, I'm not going to hold you to anything because you
14 have the right to reflect upon it, but I'm trying --

15 MR. McDONALD: Well, it appeared to me that it would
16 be specific to the RSS and punchout configurations.

17 MR. ROBERTSON: Well, the configurations that were
18 found to be infringing were configuration two, three, and five.
19 I think those are specifically defined, and the evidence is
20 what the evidence was, and the jury verdict spelled that out.
21 So that's what we'd be seeking as the scope of the injunction,
22 those configurations that included those modules and
23 applications, including the Lawson system foundation and
24 process flow in combination with the modules that were found to
25 infringe. I think there's 11 separate claims for three

1 separate configurations. That would be one.

2 Now, remember, Your Honor, the injury to Lawson is
3 almost entirely irrelevant here. It's the irreparable harm to
4 ePlus. It's the no adequate remedy for ePlus. It only comes
5 into play, if at all, in the balancing of the hardships, and
6 it's hardly the place of the now-adjudicated infringer to come
7 forth and say that the actions the jury have found to infringe
8 will cause me a hardship. That is the consequences of the
9 infringement.

10 THE COURT: But isn't the message of eBay that we are
11 to consider the standard formulation of injunctive relief which
12 includes the irreparable injury to you, the effect of the
13 injury to the other party, of course the likelihood of success
14 is no factor here because it's already happened, and there
15 aren't any other factors that come into account respecting the
16 adequacy vel non of the remedy at law and any public interest
17 factors.

18 MR. McDONALD: That's right, Your Honor. The fact
19 that these patents have all been licensed as lump sum licenses
20 where none of their -- all of their licensees have suddenly
21 written them a check and continue to sell these technologies
22 out there and that this business is less than two percent of
23 ePlus's business certainly indicate that there is a situation
24 where there is no irreparable harm to ePlus.

25 We want to show the balance of harm there with that

1 very minimal harm to them in contrast to whatever impact there
2 would be on Lawson, which I do need to talk to them about, and
3 see what that issue might be, if there's particular customers
4 out there that are hospitals or something where if they were in
5 the throes of offering the system or implementing the system
6 someplace and that had to come to a halt, would that have an
7 impact on hospitals could be something that might be relevant
8 to the Court's analysis.

9 MR. ROBERTSON: Well, Your Honor, first of all, the
10 hardship to Lawson only comes in, if at all, on this one
11 factor, this balancing of the hardships, and typically the fact
12 that the infringer built his entire business upon a foundation
13 of infringement is not something that -- otherwise, that would
14 be dispositive in every case, because an injunction is going to
15 have some hardship, no doubt, on the infringer. That's what we
16 have here.

17 THE COURT: I think I understand all that. I just
18 want to know what evidence I'm going to have to deal with, and
19 is there anything unusual about the scope of the injunction
20 that I'm going to have to deal with.

21 MR. ROBERTSON: I don't think there is anything
22 unusual. I think it's been crystalized fairly nicely with the
23 fact the way the evidence came in, the configurations and the
24 specific modules that are implicated.

25 THE COURT: So you don't envision any more evidence.

1 You're just going to use the trial evidence, but Mr. McDonald
2 wants probably some evidence, at least on the public interest
3 and on the harm to Lawson.

4 MR. McDONALD: To Lawson and potentially it's
5 potential customers here as well, yes.

6 MR. ROBERTSON: All right, well, this changed
7 dramatically from when I talked to Mr. Carr about an hour ago,
8 so I would just --

9 THE COURT: Look, just settle down.

10 MR. ROBERTSON: I understand. Sir, I need to take
11 into account what evidence -- I mean I understand Mr. McDonald
12 is formulating this right now. I would need to take into
13 account what he would be offering, and I'd need to be able to
14 determine if I need to have rebuttal witnesses in light of
15 that.

16 You know, of course, there's going to be someone who
17 is going to come in and say, yes, we'll be inconvenienced if we
18 have to stop using the Lawson software. That can be
19 accommodated in a number of ways. You can have a phase-out
20 accomodation, say six months, whatever. My client, who
21 competes with Lawson, could offer services, perhaps even at a
22 discounted rate in order to be able to replace that kind of
23 thing. That happens all the time.

24 MR. McDONALD: When we're talking about an
25 injunction, I think there's some software cases out there that

1 make it pretty clear. We're not going back to preexisting
2 customers who already have systems in place. The injunction
3 would only be a prospective thing in terms of future sales.

4 That's obviously maybe something that Mr. Robertson
5 is trying to plant the seed on that, that we're going to go
6 backwards here, but those past systems would have been the sort
7 of systems that would be subject to damages that they now can't
8 get because of Rule 37, but they don't get a second bite at the
9 apple for past customers and try to get an injunction against
10 the systems that were installed many, many years ago.

11 MR. ROBERTSON: I strongly and respectfully disagree
12 with that because Lawson's now been found to induce
13 infringements by its customers. The ongoing use of those
14 customers and Lawson's service, maintenance, and
15 implementation, and upgrades, and all the things they continue
16 to do is the induced infringement that's now been found to be
17 infringement.

18 So those systems in operation right now, Your Honor,
19 that they continue to maintain are absolutely infringing, and
20 they need to be enjoined as well. That is well within the
21 scope --

22 THE COURT: But do you enjoin the use of the system
23 by the customer on its own without Lawson?

24 MR. ROBERTSON: No. You enjoin Lawson's continued
25 inducing of infringement which means they have to stop

1 maintaining, stop servicing, stop upgrading, stop doing all the
2 things that constitute the aiding and abetting and assisting of
3 those --

4 MR. McDONALD: Yes, I don't think you do enjoy the
5 customer, Your Honor, and we will be able to supply some case
6 law and very analogous situations, for example, where parties
7 are precluded from getting past damages if they failed to mark
8 the patent number for example, and the Courts don't say, okay,
9 well, even though you can't get damages for those systems sold
10 before, we're still going to enjoin your ability to continue to
11 service those customers in a software system context. So I
12 think that's an issue we obviously have to brief.

13 THE COURT: Has the Federal Circuit ruled on that?

14 MR. ROBERTSON: Absolutely. There's a number of
15 cases, Your Honor. What Mr. McDonald said, I think, is exactly
16 right in the sense he said it's going forward. So going
17 forward, stop maintaining, stop servicing, stop implementing,
18 and stop upgrading.

19 THE COURT: All right, I think I understand. I think
20 this: We ought to have all of the evidence on before we have
21 any briefing, so, Mr. McDonald, you tell him -- since you say
22 you don't want any evidence --

23 MR. ROBERTSON: Well, Your Honor, let me just say,
24 this is a very fluid situation. If he's going to be offering
25 evidence, I might need to have some rebuttal evidence.

1 THE COURT: I didn't say anything about rebuttal
2 evidence yet. Do you want me to hear me out, give me one
3 minute?

4 MR. ROBERTSON: Yes, sir. I'm sorry.

5 THE COURT: I have in mind that since you don't want
6 to put on any evidence in direct on your opening, you would let
7 him put on whatever evidence he's going to put on, and then you
8 would put on any rebuttal evidence from what you said. Now, if
9 you think you don't want to do that, you want to do it another
10 way, that's all right.

11 MR. ROBERTSON: There's been some issue here about
12 competition. I think we've established that we're in
13 competition, but I could forth further evidence to show that
14 ePlus directly completes with Lawson.

15 THE COURT: Well, then, that's direct evidence that
16 you need to put on.

17 MR. ROBERTSON: I think that's right, Your Honor. If
18 it's still being denied or still in controversy, then I think
19 that would be something --

20 THE COURT: They'd deny it, I'm sure. They haven't
21 admitted anything.

22 MR. MERRITT: Your Honor, before we move on that,
23 there's a subtlety in this I want to be sure I'm not missing.
24 When Mr. Robertson stands up to seek the injunction, even
25 though he's not bringing live witnesses to court necessarily, I

1 assume he will be presenting to you argument based on evidence
2 that's in the record.

3 Is there some way that you that you would like to
4 have that summarized or presented in a way short of him
5 standing and arguing and making repeated references, some sort
6 of a summary or something that would be useful to the Court?

7 MR. ROBERTSON: I'd like to brief it, Your Honor.
8 I'd like to marshal the evidence and present it to you, and I'd
9 like to have them respond, and then I'd like to reply.

10 MR. MERRITT: Well, the reason I raised it is the
11 Court had indicated a desire for post-hearing briefs --

12 THE COURT: After it's all done.

13 MR. MERRITT: At the hearing itself, is there
14 something that would aid the Court in understanding what we're
15 referring to even if it is just out of the record?

16 THE COURT: Yes. What I have in mind is this: You
17 decide, Mr. Robertson, by X date, what you want to put on, and
18 if you are relying on part of the record, say to prove
19 competition, then you extract and present an exhibit that has
20 that in it. You extract from the record that, and if you want
21 to add anything to it, then you add to it, and you need to tell
22 them what you are going to be doing.

23 Then you need to do the same thing. If you're going
24 to rely on the record, Mr. McDonald, you extract what you want
25 from the record. If you're going to add anything to it, you

1 add to it, and you all need to disclose to each other what you
2 are doing, and then you do any rebuttal that you need to do.

3 I want to set a schedule for you all disclosing that
4 information to each other, what, basically, you're going to put
5 on. I don't envision any need for any further discovery on the
6 issue of damages. Neither one of you have mentioned it -- I
7 mean on injunction, and --

8 MR. McDONALD: I guess the only question there, Your
9 Honor, is if either one of us is actually going to call a live
10 witness or wants to offer up a declaration or something, it
11 seems like the other side should have a chance to take that
12 person's deposition.

13 MR. ROBERTSON: I don't think that's necessary, Your
14 Honor. We're going to put these witnesses on, we'll be able to
15 cross-examine them --

16 MR. McDONALD: I'm sorry, Mr. Robertson --

17 MR. ROBERTSON: I don't think that's necessary, Dan.
18 We can make a proffer or you can have a declaration or you can
19 outline what it's going to be, and I think we should just get
20 on with this.

21 There may be some additional exhibits, for example,
22 evidentiary exhibits. For example, Mr. Farber informs me that
23 through the summer, that there's been a number of RFPs that
24 he's been competing with with Lawson that have come to his
25 attention. So the competition is ongoing. That's happened

1 since the close of discovery.

2 THE COURT: I assume that you will inform the people
3 who are soliciting the proposals that there has now been a
4 finding of infringement and that an -- and that will be
5 something they need to keep in mind, because that will be part
6 of the evidence that I'll be hearing, I suppose, from what you
7 are saying, and if it involves injunction against Lawson
8 continuing to bid on any pending projects, then the customers,
9 I think, have a right to know that is a possibility now.

10 MR. ROBERTSON: I think that would be a wise
11 practice, Your Honor, and I anticipate there may even be a
12 press release or two that come out with respect to the outcome
13 of this --

14 MR. McDONALD: I'm sorry. If someone is talking
15 right now, I can't hear.

16 MR. ROBERTSON: Yes, Mr. McDonald, I anticipate that
17 in the competitive process, we would make known the outcome of
18 this trial as it's ongoing, but what I was suggesting to the
19 Court was that during the course of this past summer and
20 continuing in the fall, there's been a number of instances
21 where we've been competing head to head with Lawson, and we'd
22 like to present that evidence to the Court.

23 MR. McDONALD: I'm not sure why that wasn't provided
24 in supplemental discovery. You had a duty to supplement
25 discovery related to that issue right up until trial. We

1 haven't seen anything else, so I'm surprised to hear about
2 this, and I think we should have an opportunity to deal with
3 this and/or seek to exclude it as information not produced in
4 discovery.

5 THE COURT: I'm not getting into a round of all that,
6 gentlemen. We are going to go forward. We're not going to
7 have any delays. We're going to do this, and we are not playing
8 the four-corners offense here.

9 We're going to have a hearing. I want you all to --
10 ePlus, how long will it take you to notify what you want to put
11 on, notify them what you're going to put on in your opening
12 presentation on injunction?

13 MR. ROBERTSON: Could I ask for two weeks, Your
14 Honor, or if you would like less, ten days?

15 THE COURT: And then how long would it take you after
16 that to give them a response, say what you are going to offer
17 in your case, Mr. McDonald?

18 MR. McDONALD: Judge, I didn't quite hear what the
19 bottom line was from Mr. Robertson. What would be --

20 THE COURT: Ten days to two weeks is what he said --

21 MR. McDONALD: Two weeks from now?

22 THE COURT: Ten days to two weeks he said.

23 MR. McDONALD: I think three weeks would be good for
24 Lawson, Your Honor.

25 THE COURT: That's too long. What you are doing --

1 you don't understand something. You all are putting me in the
2 middle of a period of trials that I'm not going to have any
3 time to hear your injunction. I want this over now.

4 MR. ROBERTSON: Tell me what your pleasure is, Your
5 Honor, and we'll satisfy it.

6 THE COURT: We can't drag it out. ePlus has won. If
7 they are entitled to an injunction, they're entitled to it
8 right away, as promptly as the Court can get to it and give you
9 all both the process that you are due to prepare for it, but I
10 have other things to take into account, and you are talking
11 about a schedule that won't even really get this thing to me
12 until I begin to start a series of criminal and civil trials
13 that I know are not going away, and I won't be able to get to
14 you all until the fall, and I'm not going to do that. So I'm
15 sorry to burden you all after what you've done, but I know it's
16 been hard work, but I would like for you, by the 14th, which is
17 Monday --

18 MR. CARR: Talking about ePlus when you say you.

19 THE COURT: What is today? Wait a minute. Let me
20 look. The 27th. By Monday, the 7th of February, to put
21 together and notify Lawson what it is that you intend to offer
22 by way of evidence on the issue of injunction, both from the
23 record and new.

24 On the 14th, Lawson should do its response. You can
25 be doing all of your work while they are working, too, Mr.

1 McDonald.

2 MR. McDONALD: Sure, we'll do that.

3 THE COURT: And on the 21st of February, you file the
4 same thing respecting rebuttal.

5 MR. CARR: Judge, I have a suggestion. Would it be
6 helpful if we designate the evidence as you've laid out the
7 schedule, and then at the end of that we put together a joint
8 appendix and provide it all to you in one --

9 THE COURT: A joint appendix or whatever you want me
10 to do. You have to look and see. It may be easier for me to
11 look at it if it's associated with your findings of fact and
12 conclusions of law on the injunction.

13 Then when you have all of that information, is it
14 your desire to file pretrial findings of facts and conclusions
15 of law on the injunctive relief, Mr. Robertson? You said you
16 wanted to brief it, and I didn't know whether you meant brief
17 it before I hear any evidence or not.

18 MR. ROBERTSON: I think it might make sense, Your
19 Honor, to have you hear the evidence and then have us have a
20 very expedited briefing schedule after that as to what both
21 parties think that the evidence has demonstrated. We could
22 probably do that within a ten-day period for initial briefs,
23 responsive briefs, and reply briefs since it is our burden.

24 THE COURT: All right. I don't see that we're -- ask
25 Ms. Hooper to come in.

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(Discussion off the record.)

THE COURT: It will take one day, you think?

MR. ROBERTSON: Yes.

MR. CARR: I would think so. Dan, do you agree?

MR. McDONALD: The question was how long would an evidentiary hearing take?

THE COURT: Yes.

MR. McDONALD: Yes, I think one day or less.

THE COURT: I'll hear you on March 3rd beginning at 9:30 in the morning. I regard that each of you in this instance, when you file what I have dictated that you file, directed that you file, will be satisfying your obligations to update your discovery on the issue of injunctive relief because injunctive relief has been effectively severed from the case by virtue of the pretrial proceedings. I think you will have satisfied your Rule 26 updates when you file these things, and that's what I'm looking for.

Now, the 3rd of March. All right, then, when would you give me a brief, Mr. Robertson, an opening brief and findings of facts and conclusion of law post-trial?

MR. CARR: What's the day of the week, the 3rd of March?

THE COURT: It's a Thursday.

1 MR. ROBERTSON: The following Monday, Your Honor?

2 MR. McDONALD: Are you setting a briefing schedule at
3 this point? I can't hear what's going on.

4 THE COURT: Yes. The 14th of March, that gives you a
5 long time. You ought to be able to pull it together then. You
6 file your opening brief on the 14th of March. You file your
7 opening brief on the 21st of March. You file your response --

8 MR. McDONALD: Your Honor, may I mention something,
9 and I understand if it doesn't matter here, but my children
10 have their spring break from school the week of March 14th, and
11 I understand you have to keep this moving along.

12 I'm just wondering if I could at least get a couple
13 extra days, and if ePlus would like a couple of days past the
14 14th, I certainly wouldn't have a problem with that.

15 THE COURT: When do you mean?

16 MR. McDONALD: Pardon?

17 THE COURT: When do you want to file it?

18 MR. McDONALD: I would at least like it to be a
19 little later in the week of the 21st such as the 23rd or 24th
20 of March.

21 THE COURT: That's awfully late. I just don't
22 generally allow spring breaks to dictate schedules here. What
23 good does it do you to get the 21st of March if you're going to
24 be gone all that week?

25 MR. McDONALD: I'm sorry, Your Honor. I understood

1 that ePlus was proposing their brief would be due on the 14th,
2 our brief would be due on the 22nd. I was simply asking for
3 another two days before our brief would be due.

4 THE COURT: The 23rd then?

5 MR. McDONALD: Yes.

6 THE COURT: I see. I thought you were asking for all
7 that week.

8 MR. McDONALD: Oh, no.

9 THE COURT: All right, March 23rd for the response
10 and then your reply.

11 MR. ROBERTSON: 29th, Your Honor, we would request.

12 THE COURT: 28th of March.

13 MR. ROBERTSON: That's fine.

14 MR. CARR: You heard he said the 29th.

15 THE COURT: What?

16 MR. ROBERTSON: I had suggested the 29th, because
17 it's coming in on a Wednesday night, and we'd only have two
18 business days until that Monday, but if I could get to
19 the following Tuesday --

20 THE COURT: You bill extra on the weekends, don't
21 you?

22 MR. ROBERTSON: No, I don't, sir.

23 THE COURT: 29th of March for the reply. I thought
24 you said the 28th. All right. Do I then need to hear argument
25 on all this?

1 MR. ROBERTSON: I don't think so, Your Honor.

2 MR. McDONALD: I would think so, Your Honor, from
3 Lawson's standpoint.

4 THE COURT: April 4th.

5 MR. CARR: Do you have a time?

6 THE COURT: At 9:30. What date did I set the hearing
7 on?

8 THE CLERK: March 3rd at 9:30 a.m.

9 THE COURT: All right.

10 MR. ROBERTSON: Sir, just one other issue to raise
11 with you. Of course -- we hope and respect that the injunction
12 will be entered, but, of course, there will be a motion -- if
13 it is entered, there will be a motion pursuant to Rule 8(a) for
14 the district court to stay the injunction pending the appeal,
15 and that will have to be briefed and addressed, and then, of
16 course, they need to renew the motion with the Federal Circuit
17 to stay if the district judge does not stay --

18 THE COURT: I'm sorry. I couldn't hear. I think it
19 was Mr. --

20 MR. ROBERTSON: If an injunction is entered, Dan, as
21 you know, you then have the opportunity to move to stay the
22 injunction pending the appeal. That has to be brought in the
23 first instance pursuant to federal appellate rule 8(a), I
24 believe, to the district judge. If the district judge denies
25 that, then you renew your rule 8(a) motion to the Federal

1 Circuit. So I just wanted to alert the Court there's a
2 possibility that that briefing will be built into the schedule
3 after the injunction hearing.

4 THE COURT: It may be. Just abide the event and see
5 what happens. If I get such a motion, it better be quick,
6 because I'm telling you, I don't have a lot of time to be
7 spending on this case anymore. I've got other people demanding
8 to be heard who have been put in the wings, and some of those
9 people are in criminal cases. So they're going to have to get
10 some priority. So I'll expect you all to hustle your bustle
11 rustle, and we'll go from there. So we've got the schedule set
12 up; is that right?

13 MR. CARR: Judge, I don't want us to leave without --
14 Mr. Robertson mentioned the JMOLs briefly. You have denied
15 Lawson's JMOLs already. We will want to renew those JMOLs
16 after the entry of verdict as the rules provide us.

17 MR. ROBERTSON: Judgment.

18 MR. CARR: That's right. After the entry of
19 judgment, sorry, as the rules allow and I don't know if --

20 THE COURT: I don't want anymore of these. I don't
21 see any point in doing this again. It's just going to be
22 wasting paper, for Pete's sake. Just because there's a
23 procedure there that's to be done doesn't mean you have to use
24 it. You've had a full and a fair trial by the jury, and the
25 jury has made these decisions. I would urge you to reflect --

1 you don't need to make them to preserve anything for appeal, so
2 I would urge you to reflect on whether you believe it's a
3 worthwhile thing to do.

4 I can't tell you not to do them, but it seems to me
5 that just because something is there to be done, it doesn't
6 have to be done. I'm not sure why you need -- you need to
7 decide which, if any, of your rule 50 motions, Mr. Robertson,
8 in view of the verdict form, need to be entertained.

9 MR. ROBERTSON: One was already denied, Your Honor.

10 THE COURT: You don't have any at all on invalidity
11 left because you won, and I don't intend to spend any time
12 dealing with those, but you do have judgments as a matter of
13 law for infringement; right?

14 MR. ROBERTSON: Yes, Your Honor.

15 THE COURT: So you need to go back there and look and
16 see whether or not you need to press that and why.

17 MR. ROBERTSON: I understand.

18 MR. CARR: All right, Your Honor.

19 THE COURT: You need to tell them what they are. And
20 I'm not holding up anything on the injunction for these JMOLs
21 at this point, so you all need to get in your clarifying motion
22 right away and get your briefs in before the injunctive
23 process.

24 MR. ROBERTSON: Mr. Carr was representing they still
25 have two briefs that they need to file in response to ours.

1 MR. CARR: I think we have to file one brief in
2 response to yours.

3 THE COURT: Why do you need to now until he clarifies
4 what it is he's asking for, because there's no sense in you
5 replying to anything that he no longer is tendering to me
6 because he's won.

7 MR. CARR: You're right. In fact, the one we have
8 not responded to is about invalidity, and that's moot. So I
9 don't think we need to respond. We have already responded on
10 the other JMOL on infringement.

11 MR. ROBERTSON: I think our renewed JMOL would be
12 three pages long, something along those lines.

13 MR. CARR: Right. And, Judge, I've heard your
14 direction about whether we need to re-file them, and we will
15 reflect on that as you suggested.

16 THE COURT: Well, you may. It may be something I
17 don't understand. I acknowledge there are sophisticated
18 approaches, nuances to these issues that I may not grasp as
19 quickly as you all do, so if you have them, you have them, but
20 it seems to me right now that the important thing here is to
21 get on with what needs to be done to complete the cycle and the
22 process.

23 In that regard, do you have any judgments as a matter
24 of law on infringement -- I mean on any other issue like
25 indefiniteness and all that other stuff? That's dead now,

1 isn't it?

2 MR. ROBERTSON: I think that's correct, Your Honor.

3 THE COURT: The 103 issues and all that.

4 MR. ROBERTSON: Given the jury's verdict, I think
5 those are moot.

6 THE COURT: I want you to canvas what you filed and
7 agree so I can do it on the record, what's moot and what you
8 don't need to deal with. You all just need to be dealing with
9 what's live and what you need to deal with without worrying
10 about other the things, and so do I.

11 MR. ROBERTSON: We would like judgment entered.

12 THE COURT: The clerk will enter verdict on judgment
13 -- judgment on the verdict. I do it every single time. Mr.
14 Neal has had a tough time for years.

15 THE CLERK: I never actually entered judgment on a
16 complex case like this. I'm going to have to run that by you.

17 MR. ROBERTSON: Would you like us to submit a
18 proposed verdict --

19 THE COURT: Get me a final judgment order.

20 MR. CARR: Why don't we do what Mr. Robertson
21 suggested beforehand. We'll look at it, and if we have any
22 difference of opinion, we bring it to the Court.

23 THE COURT: Get it quick.

24 MR. ROBERTSON: Understood.

25 THE COURT: The other question I have is this: If

1 there's an injunction and there is a motion to stay it, you're
2 going to have to post the bond, I would suppose, here.

3 MR. ROBERTSON: I think that's right.

4 THE COURT: I think that's required, and in this
5 case, what is the kind of bond that we would have to post?

6 MR. ROBERTSON: Judge Brinkema suggested it would be
7 a dollar, but I will go back and look and see what would be
8 appropriate in this case. I need to reflect on that, Your
9 Honor.

10 THE COURT: A dollar?

11 MR. ROBERTSON: That's right, Your Honor.

12 THE COURT: One time -- I won't say it. But I
13 hope -- if all I've been dealing with here, and I have to go
14 write this jury a letter and tell them it's a dollar that
15 they've been litigating over, we spent more than that on
16 lunches.

17 MR. ROBERTSON: That would be the potential harm to
18 the defendant if the injunction entered, and she thought the
19 harm would not be significant given the fact that they had
20 built their entire business upon a foundation of infringement.

21 MR. McDONALD: I think we need to look at the issue
22 of the bond, Your Honor. I think generally, though, the
23 measure is, what if the injunction should not have been entered
24 and the party enjoined lost sales and profits as a result.
25 That is typically my experience how you measure the bond.

1 Now, what exact situation would require a bond at
2 this point, I think I need to review that. I think I heard the
3 number \$1 there? Again, it's been fading in and out, but I
4 don't think that's how we measure the injunction.

5 As I understand it, the bond would be how Lawson
6 could recover for any damages that occurred, did incur due to a
7 wrong injunction entered, and obviously a dollar wouldn't be
8 adequate to cover that.

9 THE COURT: Actually, I think the bond issue is if a
10 stay of the injunction is entered so you don't face an
11 injunction, what bond does Lawson post against what it is that
12 ePlus has by way of injury as a consequence of the stay. Is it
13 a supersedeas bond or another kind of bond? I think that's the
14 issue.

15 MR. ROBERTSON: I think we need to go back and
16 reflect on that and include it in the briefing for Your Honor.

17 THE COURT: Yes. All right. Is there anything else
18 that needs to be done?

19 MR. McDONALD: I don't know if Mr. Carr can just hand
20 Mr. Robertson a dollar and we could call this a day?

21 THE COURT: We'll flip for it and -- now, is there an
22 issue in this case -- there isn't any issue of exceptionalness
23 here warranting the imposition of fees, or is there?

24 MR. ROBERTSON: We'd like to actually go back and
25 look at that, Your Honor. We think there is case law that

1 would support --

2 MR. McDONALD: What is the question, Your Honor?

3 THE COURT: Whether it's an exceptional case
4 warranting the imposition of attorneys' fee. I said is there
5 that issue that's involved in this case, and I didn't recall
6 that it was, but --

7 MR. McDONALD: I think the willfulness would have
8 been the grounds for that, and since they dropped that, I think
9 it's essentially out of the case. I think there's also an
10 issue with respect to who is the prevailing party when you have
11 a split decision like this with some of the products found
12 infringed and others not.

13 THE COURT: Is that the law of the regional circuit,
14 or is that the law of the Federal Circuit, because I know the
15 law in the regional circuit, but I don't know that I know that
16 issue in the law of the Federal Circuit.

17 MR. McDONALD: What I have in mind -- I don't have a
18 specific case cite in my mind, but there was a Federal Circuit
19 case about a split verdict like this, but I don't have the
20 specific site, so I don't want to go on record and represent
21 that to you right now, Your Honor.

22 MR. ROBERTSON: Let us go look at this, but it's
23 ePlus's position that whether this is an exceptional case is
24 still an open question.

25 THE COURT: All right. You all need to get in front

1 of me if it is. Is there anything else that needs to be done?

2 MR. ROBERTSON: Only to thank the Court.

3 THE COURT: All right, folks, you have all your
4 documents out of here now?

5 MR. CARR: We have to get the exhibits out. That
6 went to the jury, but we will take care of that this afternoon
7 or tomorrow.

8 THE COURT: Probably tomorrow would be a good idea.
9 That will give us a chance to clear out the jury room. All
10 right. Thank you all very much. We'll move forward on this
11 schedule, and we'll proceed.

12 Mr. McDonald, you all -- what is the phrase that I
13 heard someone say not long ago? You all blew doors right
14 quickly after the hearing, and I had put on the table to you
15 all, you and your client, about talking with someone about
16 settlement discussions, and I never heard from any of you about
17 it.

18 It seems to me that this is an appropriate time to
19 reflect upon that. Is your client amenable to discussing
20 settlement, Mr. McDonald?

21 MR. McDONALD: Yes, my client is amenable to that.
22 They had been amenable earlier and had hoped to revisit it
23 after the Court had eliminated the damages claim from ePlus.
24 The problem is they really didn't budge at all, basically were
25 seeking a settlement figure based on their original damages

1 claim, and it just wasn't getting us anywhere.

2 They've actually tried to make overtures directly to
3 ePlus management that were rebuffed. Mr. Robertson required
4 that all communications go through him. I think we've been
5 trying do that, and from our standpoint, the door is still open
6 if ePlus indicates interest and wants to talk about it. I
7 think I could find somebody at Lawson who would be the
8 appropriate person to engage in that.

9 THE COURT: How about you, Mr. Robertson?

10 MR. ROBERTSON: We're always willing and agreeable to
11 talk, Your Honor, but, obviously, we've gone through a lot
12 here, and the playing field has shifted significantly --

13 THE COURT: Speak up so he can hear you.

14 MR. ROBERTSON: We understand where we are now.
15 We've had to go through and prove infringement and invalidity,
16 so we believe that the circumstances have changed. That's, you
17 know --

18 THE COURT: They have changed. There isn't any
19 question about that. It also is not -- it isn't unheard of
20 that where a trial court takes a course in the case that takes
21 out damages but there's an injunction that's there, then one
22 way to avoid the consequences of an injunction is a license,
23 and you take royalties that are adjusted downward for that --

24 MR. ROBERTSON: Understood.

25 THE COURT: -- from your highest demand of five to

1 six percent. What was it? It was in the \$20 million range,
2 but your people have to understand, if you're going to get
3 anywhere with this, that they now have something in hand that's
4 worthwhile, and that under the circumstances, this is a case
5 where you stand, Mr. McDonald, to face an injunction, and it's
6 worth your while to start talking about what's the money worth,
7 the business consideration worth to get this matter sorted out
8 now instead of later.

9 And it seems to me that if you're both willing to
10 realize that there were some things that went one way and some
11 things that went another, and that it presents a ground to
12 settle, then one of the magistrates -- who is it, Judge Dohnal
13 or Judge Lauck?

14 MR. ROBERTSON: Judge Dohnal.

15 THE COURT: Who could help you out. Who helped you
16 settle, if anybody, SAP?

17 MR. ROBERTSON: Judge Dohnal.

18 MR. CARR: He did initially. I think it was between
19 the parties directly after that.

20 MR. ROBERTSON: I think he was involved pretty much
21 right to the end. I think the parties had to wordsmith the
22 agreement, but Judge Dohnal got us to a number, but, Your
23 Honor, my client was here at the close of the testimony on
24 Friday. My client stayed here, and my client was more than
25 willing to meet with a representative of Lawson at that time.

1 There just wasn't a representative of Lawson here for him to
2 meet with.

3 THE COURT: I know but --

4 MR. McDONALD: I don't think that's a very fair
5 presentation of the situation. We had there vice president and
6 general counsel there. There was no effort to talk to us about
7 anything --

8 THE COURT: Let's don't --

9 MR. McDONALD: I do, though, agree that with the
10 verdict now in and we see which products are infringing, which
11 ones are not, that should also kind of recalibrate the system
12 here as to what's at issue and what revenues are really going
13 to be at issue here, and I would welcome discussions that would
14 be focused on what was the actual result here, and I think that
15 that could lead to a result if ePlus was actually willing, for
16 example, to just base the royalty on the products that the jury
17 found infringing, but to date they haven't had any interest in
18 doing anything like that.

19 THE COURT: Well, let's reflect on some things here
20 as well. One of the things, if I were thinking about settling
21 this case, is what's going to happen if an injunction is issued
22 and you go on appeal and you don't get a stay on appeal from
23 the District Court, and what is the Federal Circuit going to do
24 if that happens, and then what is ePlus going to appeal.

25 Well, I can tell you one thing I know they're going

1 to appeal. I don't know what else they're going to appeal, but
2 they're going to say that I was wrong on Dr. Mangum, and that
3 could change the whole dynamic of everything, and I think you
4 have to understand that that is something that needs to be
5 considered as well.

6 I don't know what else they're going to appeal. I
7 can guarantee you one thing. They're going to appeal anything
8 they think they can without violating the rules of ethics
9 because nobody has dropped anything yet.

10 MR. ROBERTSON: I dropped willfulness, Your Honor.

11 THE COURT: I know. It almost floored me. I had to
12 get the rescue squad called, but, Mr. Robertson, you have to
13 realize there were some rulings that went against them that
14 they think might affect -- they may want to take up on the
15 invalidity issues, too.

16 So there's a lot here, but I can tell you,
17 Mr. McDonald, if your people think they're going to get out
18 cheap, I don't think that's going to happen, and that isn't the
19 attitude with which they need to come here. They need to come
20 with the fact that they have been found guilty of some very
21 substantial infringements, and the fact that 11 percent of the
22 people use punchout and a nickel will get you a Coke in terms
23 of resolving the case. That's not where you start the case.

24 And, Mr. Robertson, if you think you can get
25 everything back that you lost out of your damages, you're

1 whistling Dixie, too. So you need to come at it, perhaps, from
2 a fresher mind. And I'd like to hear from you on Monday if you
3 want Judge Dohnal to get involved in settlement discussions
4 with you, and I want a commitment that you're both willing to
5 take into account the kinds of things I've said today, and I
6 really mean it.

7 If you think you're going to get to your original
8 view of things, Mr. McDonald, it isn't happening, and you're
9 wasting everybody's time. Same thing with you, Mr. Robertson.
10 If you're think you're getting everything, you are wasting
11 everybody's times, but there are middle grounds in these
12 situations, and they're actually middle grounds where maybe you
13 all can each benefit from a business standpoint.

14 MR. ROBERTSON: Your Honor, we worked it out with
15 Ariba, we worked it out with SAP, and we worked it out with
16 others. We don't come --

17 MR. McDONALD: I'll certainly talk to the Lawson
18 people about that, Your Honor. I understand what you are
19 saying. I'm going to do what I can to facilitate that
20 communication.

21 THE COURT: Who is, in the words of Judge Williams,
22 the big marble at Lawson now?

23 MR. McDONALD: The big marble?

24 THE COURT: That's the one that makes the decisions.
25 He says you have to bring your big marble to the game.

1 MR. McDONALD: I guess that's a question I should go
2 ask. I don't know want to answer that question without --

3 THE COURT: You don't want to be the marble.

4 MR. McDONALD: That will be the question I ask and
5 exactly the way I will ask it.

6 THE COURT: Here's the rule that I have. You all, I
7 think, ought to give some thought to how you want to proceed,
8 and you need to have somebody who can make the decision to
9 settle this case at a very high level without having to go talk
10 to anybody else or losing his or her job, and Mr. Robertson has
11 to have exactly the same thing, and I don't want to see any
12 general counsel showing up at a meeting as the sole
13 representative of the company.

14 They always have tunnel vision has been my
15 experience. Not all of them end up with tunnel vision, but it
16 starts that way. They certainly are welcome to come to the
17 meeting, but that's what the pretrial order generally says
18 anyway, and that is, bring the business person who can handle
19 the matter and make the decision.

20 The attorneys' fees are running, and that's the way
21 things are. All right, is there anything else you all need to
22 do? So I'll hear from you on Monday about whether you want to
23 engage Judge Dohnal further.

24 MR. CARR: All right.

25 THE COURT: I think it will be to your benefit to do

1 so, but you have to come to it with a different spirit than you
2 have right now, and off we go. So enjoy the weekend, because I
3 know you're going to be working through it.

4 MR. ROBERTSON: No rest for the weary.

5 THE COURT: Mr. McDonald, I have a question for you.
6 How much weight did you lose during the trial? Mr. Robertson
7 says that he lost 13 or 14 pounds in three weeks.

8 MR. McDONALD: I didn't lose that much. I lost about
9 six or seven.

10 THE COURT: Okay. I think maybe I need to get back
11 to trial work. Goodbye. See you all.

12 MR. McDONALD: Thank you.

13
14 (End of proceedings.)
15
16

17 We certify that the foregoing is a correct transcript
18 from the record of proceedings in the above-entitled matter.
19
20

21 /s/
22 P. E. Peterson, RPR

Date

23 /s/
24 Diane J. Daffron, RPR

Date

25